STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 15, 2008
v	No. 276770 Ogemaw Circuit Court
JOSEPH C. FICK, Defendant-Appellant.	LC No. 06-002658-FH

Before: Sawyer, P.J., and Jansen and Hoekstra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of embezzlement by a public officer, MCL 750.175. Defendant appeals as of right. Because defendant's conviction is supported by sufficient evidence, there was no discovery violation, and because an intent to defraud is not an element of the offense, nor is the offense a strict liability offense, we affirm.

Defendant first claims that there is insufficient evidence to sustain his conviction. A challenge to the sufficiency of the evidence is reviewed de novo. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). We view the evidence in a light most favorable to the prosecution to determine if a reasonable jury could have found that the essential elements of the crime were proven beyond a reasonable doubt. *Id.* Circumstantial evidence and reasonable inferences drawn therefrom can constitute satisfactory proof of the elements of a crime. *People v Lee*, 243 Mich App 163, 167-168; 622 NW2d 71 (2000).

The elements of embezzlement by a public officer are: (1) that the defendant held public office or was the agent or servant of a public officer; (2) that he received money or property in his official capacity; (3) that he appropriated the money or property for his own use or that of some other person; (4) that he did so knowingly and unlawfully; and (5) that the value was $50 or more. MCL 750.175; see also CJI2d 27.3. Defendant only argues there was insufficient evidence for the jury to find beyond a reasonable that he unlawfully appropriated county property for his own use.

Evidence was presented that defendant was issued personal gas card number 2755153 and vehicle gas card number 22. The vehicle gas card was issued for defendant's personal

vehicle. The gas cards were to be used only for official county business and not volunteer activities. After June 2005, defendant was no longer authorized to use his personal vehicle for county business.[1] Timesheets filled out by defendant evidenced the days that he reported he had worked in October, November, and December 2005. Itemized gas records from Pacific Pride showed when defendant's gas cards were used to purchase gasoline. The records indicated that, during October through December 2005, defendant used his vehicle gas card on nine days that he did not work.[2] Six of the purchases were for 19.6 gallons of gasoline. However, no county fleet vehicle, other than the jail van and the animal control truck, could hold 19.6 gallons of gasoline. Defendant was not assigned to either the corrections or animal control departments during October, November, or December 2005. Further, Larry DeAugustine testified that, on November 3, 2005, defendant, at a Pacific Pride gas station, put gasoline in his personal vehicle and then used the vehicle for personal errands rather than county business. Viewing this evidence in a light most favorable to the prosecution, a reasonable jury could have found that defendant unlawfully appropriated county property to his own use beyond a reasonable doubt. *Cline, supra*. Defendant's conviction is supported by sufficient evidence.

Defendant next claims that the trial court abused its discretion in denying his request to admit into evidence the September 2005 billing statement of gas purchases. Defendant further contends the trial court's refusal to admit the billing statement into evidence deprived him of his right to present a defense. However, because defendant withdrew the exhibit prior to the trial court's ruling, the issue is waived, see *People v Goddard*, 135 Mich App 128, 138; 352 NW2d 367 (1984), rev'd on other grounds 429 Mich 505 (1988), and we decline to review it.[3]

Defendant also claims that he was denied his right to a fair trial by the surprise testimony of an undisclosed statement and by defense counsel's failure to request a mistrial or continuance in light of the statement. We disagree. We review the admission or exclusion of evidence by the trial court for an abuse of discretion. *People v Bauder*, 269 Mich App 174, 179; 712 NW2d 506 (2005). A trial court abuses its discretion when its action falls outside the principled range of outcomes. *People v Carnicom*, 272 Mich App 614, 616-617; 727 NW2d 399 (2006).

Defendant argues that the prosecution violated MCR 6.201(B) when it failed to provide him with his statement to Sheriff Howie Hanft that, upon submitting a letter of resignation, he offered to pay for the gasoline.[4] MCR 6.201(B) provides in relevant part:

> Upon request, the prosecuting attorney must provide each defendant:

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[1] Defendant, however, retained possession of his personal gas vehicle card.

[2] The county paid the bills that included defendant's gas usage.

[3] In any event, the trial court properly found that the September 2005 billing statement was irrelevant. The existence of evidence showing days that defendant was scheduled to work when he pumped gasoline using vehicle card 22 did not make any fact of consequence more or less probable. MRE 401.

[4] The prosecutor told the trial court that Hanft's trial testimony was "pretty much" the first time she had heard that defendant had offered to pay for the gasoline.

* * *

> (3) any written or recorded statements by a defendant, codefendant, or accomplice pertaining to the case, even if that person is not a prospective witness at trial[.]

The term "statement" is not defined in MCR 6.201. *People v Holtzman*, 234 Mich App 166, 176; 593 NW2d 617 (1999). However, the definition of "statement" contained in MCR 2.302 is incorporated by reference into the rules of criminal procedure. *Id.* at 176-177. Pursuant to MCR 2.302(B)(3)(c), a "statement" is either of the following:

> (i) A written statement signed or otherwise adopted or approved by the person making it; or
>
> (ii) a stenographic, mechanical, electrical, or other recording, or a transcription of it, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

Here, because defendant's offer was not evidenced in any writing signed, adopted or approved by defendant, nor was defendant's offer contemporaneously recorded, it was not a "statement" as defined by the court rules. Consequently, defendant's argument that he was denied a fair trial by the prosecution's failure to comply with MCR 6.201(B) is without merit.

Even if a discovery violation had occurred, we would not find that the trial court erred in refusing to prohibit Hanft from testifying about defendant's offer to pay for the gasoline. When deciding the appropriate remedy for a discovery violation, a trial court must balance the interests of the public, the court, and the parties in light of all relevant circumstances. *People v Greenfield (On Reconsideration)*, 271 Mich App 442, 454 n 10; 722 NW2d 254 (2006). In addition, the complaining party must show that the violation caused him actual prejudice. *Id.* Although defendant claims that, by the prosecution's failure to disclose his offer, defense counsel had an inadequate opportunity to prepare, he did not indicate what, if anything, would have been done differently had defendant's offer been disclosed. Accordingly, defendant failed to meet his burden of showing actual prejudice.

Defendant has only given cursory treatment to his claim of ineffective assistance of counsel.[5] Accordingly, defendant has abandoned the issue. See *People v Matuszak*, 263 Mich App 42, 59; 687 NW2d 342 (2004). In any event, based on the record,[6] the claim lacks merit. Because there was no discovery violation, a motion for a mistrial would have been meritless. Counsel is not required to advocate a meritless position. *People v Snider*, 239 Mich App 393,

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[5] Defendant's argument consists of one sentence and one citation. Defendant does not even identify which portion of the identified case supports his claim.

[6] Because defendant did not request a *Ginther* hearing, *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), our review of defendant's claim "is limited to mistakes that are apparent on the record." *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005).

425; 608 NW2d 502 (2000). Moreover, counsel's own statements to the trial court indicate that his choice not to request a mistrial was a matter of trial strategy. We will not second-guess counsel on matters of trial strategy, nor we will assess counsel's competence with the benefit of hindsight. *People v Rice* (*On Remand*), 235 Mich App 429, 444-445; 597 NW2d 843 (1999). Defendant was not denied the effective assistance of counsel.

Defendant's final two claims relate to the intent element of the charged offense. Defendant argues that the trial court erred by denying his request for a jury instruction on intent because intent to defraud is an essential element of the charged offense. Defendant concludes that if MCL 750.175 is not interpreted to require an intent to defraud, embezzlement by a public officer becomes an unconstitutional strict liability offense. We review de novo claims of instructional error. *People v Hubbard* (*After Remand*), 217 Mich App 459, 487; 552 NW2d 493 (1996). Whether a statute imposes strict liability or requires proof of *mens rea* requires a review of the statute to determine the Legislature's intent. *People v Quinn*, 440 Mich 178, 185; 487 NW2d 194 (1992). Statutory interpretation is a question of law that is also reviewed de novo. *People v Derror*, 475 Mich 316, 324; 715 NW2d 822 (2006). A jury must be instructed on all the elements of the charged offense. *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). However, "[e]rror does not result from the omission of an instruction if the charge as a whole covers the substance of the omitted instruction." *Id.*

We conclude that the trial court's jury instructions were proper and that such instructions did not render MCL 750.175 a strict liability crime. In *People v Glazier*, 159 Mich 528, 546; 124 NW 582 (1910), our Supreme Court interpreted 1897 CL 11612[7] and held that "the adverb 'knowingly' used in the statute was intended to exclude from the definition of the offense mistakes of fact, accidents, such as the loss of the money by fire or other casualty, or inadvertent appropriations," and that the provisions of the law "plainly imply that a felonious intent is not an element of the crime." The *Glazier* Court went on further to state:

> In our opinion it was the intention of the legislature to provide that any public officer, who devoted the public funds in his custody and control to any other purpose than those to which the law authorized their appropriation, must account for them to his successor, or be guilty of a felony, *no matter how good his intentions may have been*. [*Id.* (emphasis added).]

This position was then reaffirmed in *People v Hopper*, 274 Mich 418, 423; 264 NW 849 (1936) ("Under the latter section [MCL 750.175], proof is required that the accused knowingly and unlawfully appropriated to his own use, etc., while under the former [MCL 750.174] it is necessary to show fraudulent intent"). The Supreme Court has not altered its interpretation of the word "knowingly" as the word is used in MCL 750.175. The trial court properly relied on these cases when it denied defendant's request for an intent instruction.

Defendant quotes CJI 27:2:01, the predecessor of CJI2d 27.3, for jury instructions on "unlawfully" and "knowingly." Specifically, the instructions include the following definitions:

[7] This statute, the predecessor of MCL 750.175, is essentially worded the same as MCL 750.175.

"Knowingly means that the defendant knew the property [money] was public property. Unlawfully means that the defendant used the property [money] for an unauthorized purpose." CJI 27:2:01(6). This language supports the conclusion that the jury instructions given by the trial court were proper. Although the trial court did not include the specific language "that defendant did so knowingly and unlawfully" in its instructions, the third and fourth elements of the offense as set forth by the trial court in the instructions given at trial are almost exact replications of the above definitions.[8] Thus, it does not appear that, if there was any error, the error requires reversal. "[T]he charge as a whole covers the substance of the omitted instruction." *Canales, supra*.

Furthermore, the lack of a fraudulent intent does not transform the offense into a strict liability crime. "For a strict-liability crime, the people need only prove that the act was performed regardless of what the actor knew or did not know." *People v Lardie*, 452 Mich 231, 240-241; 551 NW2d 656 (1996), overruled on other grounds *People v Schaefer*, 473 Mich 418 (2005). Here, defendant could not be convicted without regard to his knowledge. The prosecution, as evidenced by the trial court's jury instructions, was required to prove that defendant knew the gasoline was public property. See CJI 27.3(4).

Affirmed.

/s/ David H. Sawyer
/s/ Kathleen Jansen
/s/ Joel P. Hoekstra

[8] The trial court instructed the jury:

> Third, that the defendant knew the gasoline was public property;
>
> Fourth, the defendant used the gasoline for an unauthorized use. The charge in this case is the defendant used the gas for personal use, such use of public gasoline is unauthorized.